IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SANDRA LEE,

Plaintiff,

v.

RUBIN LUBLIN TN, PLLC and BANK OF AMERICA, N.A.,

Defendants.

Case No. 3:17-cv-00500
Judge Crenshaw
Magistrate Judge Newbern

RUBIN LUBLIN TN, PLLC'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

COMES NOW, Rubin Lublin TN, PLLC ("Rubin Lublin"), and hereby files this Response in Opposition to the Plaintiff's Motion for Leave to File Amended Complaint [Doc. 23] (the "Motion for Leave"), respectfully showing this Honorable Court as follows:

INTRODUCTION

Rubin Lublin moved to dismiss this case on the basis that Sandra Lee lacks Article III standing and for failure to state a claim. Instead of preparing a timely response to that motion, her attorney, James D.R. Roberts, Jr., contacted Moonlighters Enterprises, a Tennessee corporation, to advise it that he would be adding it as a party to this case solely to defeat diversity and have the case remanded to state court. True to his word, Roberts filed a Motion for Leave on April 20, 2017, "to allow him [*sic*] to amend his Complaint to add a necessary party Moonlighters Enterprises, Inc." [Doc. 23] at p. 1. This is an egregious, and likely sanctionable, abuse and waste of this Court's and the Defendants' resources. Fortunately, 28 U.S.C. § 1447(e) addresses such a situation, and grants this Court the authority to deny leave to amend. This Court should do just that.

RELEVANT FACTS AND PROCEDURAL HISTORY

Lee initially filed this lawsuit in Davidson County Circuit Court on February 10, 2017, naming only Rubin Lublin and Bank of America as Defendants. *See* [Doc. 1-1]. Seeing as Lee quitclaimed her interest in the property[1] – the foreclosure sale of which she is challenging in this suit – over *four years* prior to the sale, both Defendants moved to dismiss for lack of Article III standing and for failure to state a claim. *See* [Docs. 10, 12]. After failing to file a timely response, Lee moved for an extension of time to respond on March 31, 2017 (the "Motion for Extension"), which this Court granted. [Docs. 15, 18].

In the Motion for Extension, Lee noted that "[s]ince the case was filed in state court the plaintiff has identified an additional party which must be joined pursuant to Fed. R. Civ. Pro. 19 and/or 20. Ms. Lee intends to seek leave prior to the Case Management Conference for the same in the next few days." [Doc. 15] at p. 1. That party, as we now know, is Moonlighters Enterprises, Inc., a Tennessee corporation ("Moonlighters"). *See* [Doc. 23] at p. 1. We also know that this statement in the Motion for Extension is a falsehood, as Moonlighters is referenced throughout the original Complaint, and therefore is not a newly identified party. *See* [Doc. 1-1], ¶¶ 4, 16, 21, 26, 74, 92. Instead, Lee consciously omitted Moonlighters as a party from the original Complaint, and now seeks only to add it in order to defeat diversity and have this case remanded to state court.

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[1] Lee quitclaimed her interest to William E. Kantz, Jr. *See* [Doc. 11-4]. Kantz litigated the propriety of the foreclosure sale in this Court, and lost. *See Kantz v. Rubin Lublin, PLLC*, No. 3:14-cv-01113, 2015 WL 1543531 (M.D. Tenn. April 6, 2015), *aff'd*, No. 15-5490, [Doc. 59] (6th Cir. March 30, 2017) ("*Kantz I*"). A copy of *Kantz I* is filed at [Doc. 11-1]. Despite losing, Kantz filed a second, identical challenge to the sale, which is currently pending in this Court as Case No. 3:15-cv-00932 ("*Kantz II*"). A third case has also been filed by Kantz related to the sale, and is pending in this Court as Case No. 3:17-cv-00051 ("*Kantz III*"). All three cases are identified on the docket of this Case as being related. So as not to spend unnecessary time in this brief recounting the *Kantz* cases, Rubin Lublin assumes this Court's familiarity with the facts and procedural posture of these cases.

On the same day that the Motion for Extension was filed, Roberts called Matthew Lynch, the president of Moonlighters. *See* Declaration of Matthew Lynch, attached hereto as **Exhibit "A"**. During that call, Roberts "explained that he was an attorney representing someone 'who may have to sue' [Moonlighters] regarding a foreclosure sale in Nashville a few years ago" and that he needed to do this "because his client needed to have the case moved from federal court to a local [state] court." *Id.*

Following through with his statements to Mr. Lynch, Roberts (on behalf of Lee) filed the Motion for Leave on April 20, 2017, "to allow him [*sic*] to amend his Complaint to add a necessary party Moonlighters Enterprises, Inc. ('Moonlighters')." [Doc. 23]. The proposed Amended Complaint is nearly identical in all respects to the original Complaint, save for the addition of Moonlighters. *Compare* [Doc. 1-1] *with* [Doc. 23-1]. The Motion for Leave also asks for the case to be remanded, as Moonlighters is a citizen of Tennessee. *See* [Doc. 23] at p. 3. This Court should not permit such a party or an attorney to take such egregious steps in a case, and the Motion for Leave should be denied.

ARGUMENT AND CITATION OF AUTHORITY

A. Lee Should Not be Permitted to Amend Solely to Defeat Subject Matter Jurisdiction

The sole purpose for the Motion for Leave is to attempt to strip this Court of subject matter jurisdiction by adding a dispensable Tennessee citizen as a party. "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." 28 U.S.C. § 1447(e). The fact that the attempt to add Moonlighters was done in a Motion for Leave to Amend the Complaint under Rule 15 is irrelevant, as Rule 15 "does not insulate a plaintiff's attempt to join non-diverse defendants from the command of section 1447(e)." *Phillip-Stubbs v. Walmart Supercenter*, No. 12-10707, 2012 WL 1952444, at *3 (E.D. Mich. May 25, 2012) (collecting cases).[2] "A post-removal attempt to add non-diverse parties, whether by right or by leave, implicates section 1447(e) and requires the court to exercise discretion and adopt one of the two options available to it."[3] *Id.* at *4.

> There are four factors that inform such discretion: "(1) the extent to which the purpose of the amendment is to defeat jurisdiction; (2) whether the plaintiff was dilatory in seeking the amendment; (3) whether the plaintiff will be injured significantly if the amendment is not allowed; and (4) any other factors bearing on the equities." *Siedlik v. Stanley Works, Inc.,* 205 F.Supp.2d 762, 765 (E.D. Mich. 2002). The court also must consider the diverse defendant's interest in selecting a federal forum. *See Wells v. Certainteed Corp.,* 950 F. Supp. 200, 201 (E.D. Mich. 1997) (Duggan, J.) (citing *Hensgens v. Deere & Co.* 833 F.2d 1179, 1182 (5th Cir. 1987)).

Id.

"The general impetus for applying § 1447(e) is for the trial court to use its discretion and determine if allowing joinder would be fair and equitable." *Ivnes v. Novartis Pharm. Corp.*, No. 3:12-CV-191, 2013 WL 499211, at *2 (E.D. Tenn. Feb. 7, 2013) (quoting *City of Cleveland v. Deutsche Bank Trust Co.*, 571 F. Supp. 2d 807, 823 (N.D. Ohio 2008)).[4] Allowing Lee to add

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[2] A copy of *Phillip-Stubbs* is attached hereto as **Exhibit "B"**.

[3] Although it is not relevant whether Lee has the right to amend, or must seek leave, Roberts noted in the Motion for Leave that he "is uncertain if Ms. Lee has a right to amend his [*sic*] pleading 'once as a matter of course,' or is required to seek leave of court to amend." [Doc. 23] at p. 2. It is not clear why he has such uncertainty, since Rule 15 is clear. The right to a free amendment expires 21 days after a Rule 12(b) motion is filed. Fed. R. Civ. P. 15(a)(1)(B). Such a motion was filed on March 16, 2017 [Doc. 10], 35 days before the Motion for Leave was filed. It is irrelevant that Lee obtained an extension of time to respond to the Motion to Dismiss, as the deadline in Rule 15 is not tied, in any way, to the response deadline for a Rule 12(b) motion, which is set by LR 7.01(b) (M.D. Tenn.), and is 14 days, not 21.

[4] A copy of *Ivnes* is attached hereto as **Exhibit "C"**.

Moonlighters would be anything but fair and equitable, as an analysis of the relevant factors reveals.[5]

1. The extent to which the purpose of the amendment is to defeat jurisdiction

Looking at the first of the four factors – "the extent to which the purpose of the amendment is to defeat jurisdiction" – it is easy to conclude that it weighs heavily in favor of denying joinder. This Court has been presented with damning evidence, in the form of Matthew Lynch's Declaration, that the *sole* purpose of the amendment is to defeat jurisdiction. However, this is not the only evidence before the Court relating to this factor.

Additional support can be found in the fact that Lee – despite not having an interest in the subject property at the time of the foreclosure sale to the Federal Home Loan Mortgage Corporation ("Freddie Mac") – apparently seeks to have the sale set aside without ever naming Freddie Mac as a party. *See* [Doc. 23-1] at ¶¶ 59, 91. This is significant because the addition of Freddie Mac as a party would vest this Court with federal question jurisdiction over every claim in the case. *See Fed. Home Loan Mortg. Corp. v. Gilbert*, 656 F. App'x 45, 53 (6th Cir. 2016) (Sutton, J., concurring) (citing 12 U.S.C. § 1452(f)). Under 12 U.S.C. § 1452(f), which is Freddie Mac's federal charter, "all civil actions to which the Corporation is a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such actions, without regard to amount or value." Lee's counsel Roberts is, without a doubt, aware of this statute and its implications, as it has been raised in *Kantz I* and *II*, where Roberts is also counsel. *See Kantz II*, No. 3:15-cv-00932, [Doc. 1] (M.D. Tenn. Aug. 26, 2015) (Notice of Removal filed by Roberts, citing 12 U.S.C. § 1452(f) as the basis for removal); *Kantz I*, No. 3:14-cv-01113, [Doc. 21] (M.D. Tenn. May 29, 2014) (citing 12

[5] The second factor will not be addressed, as Rubin Lublin does not contend that Lee has been dilatory in seeking amendment.

U.S.C. § 1452(f)) (order denying Kantz's Motion to Remand, "as with the Federal Home Loan Mortgage Corporation as a defendant, this action arises under federal law."). The attempted addition of Moonlighters, plus the glaring omission of Freddie Mac, makes it easy here to conclude that Lee is trying to amend for no reason other than to have this case remanded to state court.

2. *Whether the plaintiff will be injured significantly if the amendment is not allowed*

The next factor to be looked at is "whether the plaintiff will be injured significantly if the amendment is not allowed." The short answer is no. Moonlighters is a dispensable, unnecessary party, and Lee admits that "it was acting as Rubin Lublin's agent at all times relevant to this matter." [Doc. 23-1] at ¶ 4.

> It has long been recognized in Tennessee that a principal may be held vicariously liable for the negligent acts of its agent when the acts are within the actual or apparent scope of the agent's authority. It is also generally recognized that a plaintiff may sue a principal based on its vicarious liability for the tortious conduct of its agents without suing the agent. Even where the agent's conduct is the sole basis for the principal's liability, the agent remains a "proper, but not a necessary" party. Thus, a plaintiff is free to sue the agent, the principal, or both. This common-law framework is well-established in Tennessee law.

Abshure v. Methodist Healthcare-Memphis Hosps., 325 S.W.3d 98, 105–06 (Tenn. 2010) (citations omitted).

Other federal courts around the country have denied joinder of parties under 28 U.S.C. § 1447(e) because the non-diverse party sought to be joined was the agent of a diverse principal, who was already a defendant. *Dorfman v. Massachusetts Cas. Ins. Co.*, No. CV-1506370 MMMASX, 2015 WL 7312413, at *8 (C.D. Cal. Nov. 19, 2015) (collecting cases); *Keshish v. Allstate Ins. Co.*, No. CV 12-03818-MMM (JCX), 2012 WL 12887075, at *5 (C.D. Cal. Oct. 19, 2012); *Lauer v. Extendicare Homes, Inc.*, No. C06-5124FDB, 2006 WL 925137, at *1 (W.D.

Wash. Apr. 7, 2006).[6] Thus, the presence of Rubin Lublin in this case is sufficient to allow Lee to bring her claims, however meritless they may be.[7] Lee will suffer no injury whatsoever if joinder is rejected, and the Motion for Leave should be denied.

3. Any other factors bearing on the equities

In addition to the factors discussed above, it is important that this Court take into consideration that it has been the only Court (other than the Sixth Circuit, on appeal from this Court) managing the cases related to the subject foreclosure sale since *Kantz I* was removed and docketed on May 6, 2014 – nearly three years ago. Although *Kantz I* is now complete, *Kantz II* and *III* remain pending and are being actively litigated. This Court has been faced with numerous discovery issues and other procedural motions in both cases, and they have been actively attended to by this Court. Rubin Lublin would be greatly prejudiced if it had to litigate the same issues before two courts, under two different sets of procedural rules, and before different judges, who are not familiar with the various issues that have come before the Court, both in this case and the *Kantz* cases. In fact, this Court previously recognized the utility of having the same judge manage this case and the *Kantz* cases when Magistrate Judge Fresnley, "[f]ollowing consultation with Judge Newbern," transferred this case from himself to Judge Newbern, who is handling *Kantz II* and *III*. *See* [Doc. 9]. As such, it only makes sense for one court, and one set of judges, to be managing this case and the *Kantz* cases.

Furthermore, allowing Moonlighters to be added as a party, and therefore causing the case to be remanded, will only prolong the inevitable dismissal for lack of standing on the part of

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[6] A copy of *Dorfman* is attached hereto as **Exhibit "D",** *Keshish* as **Exhibit "E"**, and *Lauer* as **Exhibit "F"**.

[7] Notably, Moonlighters was never sought to be added as a party to the *Kantz* cases. This lends more support, not only for the argument that it is a dispensable party, but for the notion that Lee is trying to add Moonlighters solely to defeat diversity. With Freddie Mac as original parties in both cases, Kantz could not seek to add Moonlighters to defeat diversity like he has here, as Freddie Mac's presence gave this Court federal question jurisdiction.

Lee, and raise the costs for all parties involved by requiring them to brief new motions to dismiss. As noted in Rubin Lublin's Motion to Dismiss, Lee has no interest in the subject property and therefore lacks Article III standing. *See* [Doc. 11] at pp. 8-9. Standing in Tennessee state courts is established using the same factors as this Court uses to determine Article III standing. *See City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013). Thus, since Lee lacks standing here, she also lacks standing in state court.

Rubin Lublin also argued, in the alternative, its Motion to Dismiss, that the Complaint fails to state a claim upon which relief can be granted. *See* [Doc. 11]. Amendments should be denied if a proposed amendment is futile, or in other words, "if the amendment could not withstand a Rule 12(b)(6) motion to dismiss." *Kantz I*, 2015 WL 1543531, at *6 (quoting *Riverview Health Inst. LLC v. Med. Mut. of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010)). Since the proposed amendment is nearly identical to the original Complaint, save for the addition of Moonlighters and deletion of a claim under the Tennessee Consumer Protection Act, the same arguments in favor of dismissal of the original Complaint also apply to the proposed amendment. This futile amendment should not be allowed.

The weighing of the equities is clearly in Rubin Lublin's favor, and this Court should not permit the joinder of Moonlighters. Lee is unquestionably attempting to amend solely to deprive this Court of jurisdiction in a case that belongs before only one court – this one.

CONCLUSION

Based on the foregoing, Rubin Lublin respectfully requests that this Court deny the Motion for Leave.

Respectfully submitted, this 2nd day of May, 2017.

HALL BOOTH SMITH, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of May, 2017, I filed the within and foregoing by CM/ECF, which will send notice to all parties in this case.

HALL BOOTH SMITH, P.C.

/s/ H. Buckley Cole
H. Buckley Cole (BPR No. 11811)